United States Court of Appeals

for the Second Circuit

APPENDIX

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P/5

74-2604

United States Court of Appeals

FOR THE SECOND CIRCUIT

CLEARVIEW CONCRETE PIPE CORP., d/b/a CLEARVIEW CONCRETE PRODUCTS CORP., and GRAND PRE-STRESSED CORP.,

Petitioners,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

APPENDIX

HYNES & DIAMOND
Attorneys for Petitioners
Office & P. O. Address:
25 Broadway
New York, N. Y. 10004

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PAGINATION AS IN ORIGINAL COPY

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CERTIFIED LIST OF THE NATIONAL LABOR RELATIONS BOARD

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CLEARVIEW CONCRETE PIPE CORP., d/b/a CLEARVIEW CONCRETE PRODUCTS CORP., AND GRAND PRE-STRESSED CORP.,	)	
Petitioners,	)	
v.	)	No. 74-2604
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

CERTIFIED LIST OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.115, Rules and Regulations of the National Labor Relations Board - Series 8, hereby certifies that the list set forth below constitutes a full and accurate transcript of the entire original record of a proceeding had before said Board and known upon its records as Case No. 29-CA-3560. Such transcript includes the pleadings and testimony and evidence upon which the Order of the Board was entered and includes also the findings and order of the Board.

VOLUME I - Exhibits introduced into evidence at the hearing:

GENERAL COUNSEL'S EXHIBIT NOS.

1(aa) thru 1(oo)

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VOLUME II	CERTIFIED RECORD
Stenographic transcript of testimony taken before Administrative Law Judge Benjamin B. Lipton on February 19, and 20, and March 4, 1974.....	1 - 343

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1. Copy of Administrative Law Judge Benjamin B. Lipton's Decision issued on June 14, 1974.....	1 - 19
2. Copy of Petitioners' Exceptions in Opposition to Decision and Order of Administrative Law Judge, received July 26, 1974[1/].....	1 - 12
3. Copy of Decision and Order issued by the National Labor Relations Board on November 7, 1974.....	1 - 2

1/ Petitioners herein were Respondents before the Board.

Certified List of the National Labor Relations Board

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: Clearview Concrete Pipe Corp., d/b/a Clearview Concrete Products Corp., and Grand Pre-Stressed Corp.

Case No.: 29-CA-3560

9.21.73	Charge filed
11.26.73	Amended Charge filed
11.30.73	Complaint and Notice of Hearing, dated
12.19.73	Petitioners' Answer, received
1. 9.74	Order Rescheduling Hearing, dated
2. 5.74	Notice of Pre-Hearing Conference, dated
2.14.74	Petitioners' request for an adjournment of hearing, dated
2.15.74	Regional Director's Order, dated
2.19.74	Hearing opened
3. 4.74	Hearing closed
6.14.74	Administrative Law Judge Benjamin B. Lipton's Decision issued
7.26.74	Petitioners' Exceptions in Opposition to Decision and Order of Administrative Law Judge, received
1. 7.74	Decision and Order issued by the National Labor Relations Board

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CHARGE

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 29-CA-3560

Date Filed 9-21-73

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer: CLEARVIEW CONCRETE PIPE CORPORATION

b. Number of Workers Employed: 100

c. Address of Establishment (Street and number, city, State, and ZIP code): 60 East Industry Court, Deer Park, N.Y. 11729

d. Employer Representative to Contact: Vincent DeLillo

e. Phone No.: 516 MO7-1222

f. Type of Establishment (Factory, mine, wholesaler, etc.): factory

g. Identify Principal Product or Service: pre-stressed concrete

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (3) (List subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since on or about July 26, 1973, the above-named employer discharged JOHN WINFIELD and SALVATORE DI SOMMA because of their membership in and activities on behalf of District 15, International Association of Machinists and Aerospace Workers.

Since on or about August 3, 1973, the above-named employer discharged LOUIS LEONARDI and PETER LEONARDI because of their membership in and activities on behalf of District 15.

Since on or about August 8, 1973 the above-named employer discharged GEORGE BARTOLLAND, and EARL NARE because of their membership in and activities on behalf of District 15.

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number): EARL NARE

4a. Address (Street and number, city, State, and ZIP code): 36 MAGRO DRIVE., NORTH BABYLON, N.Y. 11703

4b. Telephone No.: 516 MO 9-4403

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

6. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By Earl Nare (Signature of representative or person filing charge) — individual (Title, if any)

Earl Nare

Address 36 Magro Drive, North Babylon, NY 516 MO-9-4403 (Telephone number) — 9-21-73 (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

GPO 861-475

A 4

AMENDED CHARGE

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

AMENDED CHARGE AGAINST EMPLOYER

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.	DO NOT WRITE IN THIS SPACE Case No. 29-CA-3560 Date Filed 11-26-73

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer	b. Number of Workers Employed
(i) Clearview Concrete Products Corp. (ii) Grand Pre-Stressed Corp.	(i) & (ii) 100-approx. total of both

c. Address of Establishment (Street and number, city, State, and ZIP code)	d. Employer Representative to Contact	e. Phone No.
(i) and (ii) 60 East Industry Court Deer Park, N.Y. 11729	(i) & (ii) Vincent DeLillo	516- M07-1222

f. Type of Establishment (Factory, mine, wholesaler, etc.)	g. Identify Principal Product or Service
(i) & (ii) Factory	(i) and (ii) pre-stressed concrete products

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (3) (List subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since on or about July 26, 1973, Clearview Concrete Products Corp. JOHN WINFIELD and SALVATORE DI SOMMA because of their membership in and activities on behalf of District 15, International Association of Machinists and Aerospace Workers Local 447.

Since on or about August 2, 1973, Grand Prestressed Corp., discharged LOUIS LECNARDI because of his membership in and activities on behalf of District 15.

Since on or about August 2, 1973 Clearview Concrete Pipe Corporation discharged PETER LECNARDI because of his membership in and activities on behalf of District 15.

Since on or about August 8, 1973 Clearview Concrete Products Corp. discharged George Bartolliand, and Earl Nare because of their membership in and activities on behalf of District 15.

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)

Earl Nare

4a. Address (Street and number, city, State, and ZIP code)	4b. Telephone No.
36 Magro Drive, North Babylon, N.Y. 11703	516 MO9-4403

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

6. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By [signature] Individual
(Signature of representative or person filing charge) (Title, if any)

Address 36 Magro Drive, North Babylon, New York 516-MO9-4403 (Telephone number) 11/20/73 (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

GPO 791-571

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COMPLAINT AND NOTICE OF HEARINGS

NATIONAL LABOR RELATIONS BOARD

NOTICE

Case No. 29-CA-3560

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end. An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing.

However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements *will not be granted* unless good and sufficient grounds are shown *and* the following requirements are met:

(1) The request must be in writing. An original and two copies must be served on the Regional Director;

(2) Grounds therefor must be set forth *in detail;*

(3) Alternative dates for any rescheduled hearing must be given;

(4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and

(5) Copies must be simultaneously served on all other parties *(listed below),* and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

Clearview Concrete Pipe Corp. d/b/a
Clearview Concrete Products Corp.
60 East Industry Court
Deer Park, N.Y. 11729

Grand Pre-Stressed Corp.
60 East Industry Court
Deer Park, N.Y. 11729

Earl Nare
36 Magro Drive
North Babylon, N.Y. 11703

Hynes & Diamond
25 Broadway
New York, N.Y. 10004
Att: Francis P. Donelan, Esq.

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Complaint and Notice of Hearings

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

CLEARVIEW CONCRETE PIPE CORP., d/b/a
CLEARVIEW CONCRETE PRODUCTS CORP.,
AND GRAND PRE-STRESSED CORP.

and Case No. 29-CA-3560

EARL NARE, An Individual

COMPLAINT AND NOTICE OF HEARING

It having been charged by Earl Nare, an individual, that Clearview Concrete Pipe Corp., d/b/a Clearview Concrete Products Corp., herein called Respondent Clearview, and Grand Pre-Stressed Corp., herein called Respondent Grand, and sometimes herein collectively called Respondents, have engaged in, and are engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151, et seq., herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director for Region 29, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations - Series 8, as amended, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1. (a) The Charge in this proceeding was filed by Earl Nare, an individual, on September 21, 1973, and served by registered mail upon Respondent Clearview on or about September 21, 1973.

(b) The First Amended Charge in this proceeding was filed by Earl Nare, an individual, on November 26, 1973, and served by registered mail upon Respondents on or about November 26, 1973.

2. (a) Respondent Clearview is, and has been at all times material

herein, a corporation duly organized under, and existing by virtue of, the laws of the State of New York.

(b) At all times material herein, Respondent Clearview has maintained its principal office and place of business at 60 East Industry Court, in the Town of Deer Park, County of Suffolk, and State of New York, where it is, and has been at all times material herein, engaging in the manufacture, sale and distribution of concrete pipe and related products.

3. (a) Respondent Grand is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of New York.

(b) At all times material herein, Respondent Grand has maintained its principal office and place of business at 60 East Industry Court, in the Town of Deer Park, County of Suffolk, and State of New York, where it is, and has been at all times material herein, engaged in the manufacture, sale and distribution of pre-stressed concrete products and related products.

4. Respondents are, and at all times material herein, have been affiliated businesses and grand operate with common officers, ownership, directors and operators, and constitute a single integrated business enterprise; the said directors and operators formulate and administer a common labor policy for the aforenamed companies, affecting the employees of said companies.

5. During the past year, which period is representative of their annual operations generally, the Respondents, in the course and conduct of their business, purchased and caused to be transported and delivered to their place of business, cement, iron rods, and other goods and materials valued in excess of $50,000, of which goods and materials valued in excess

of $50,000 were transported and delivered to their place of business in interstate commerce directly from states of the United States other than the State of New York.

6. Respondents, and each of them, are, and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

7. District 15, International Association of Machinists and Aerospace Workers, AFL-CIO, herein called the Union, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

8. David Frances, Respondents' plant superintendent, is, and has been at all times material herein, an agent of Respondents, acting on their behalf, and a supervisor thereof within the meaning of Section 2(11) of the Act.

9. On or about July 16, 23, 25 and 26, 1973, August 2 and 8, 1973, and on various other dates presently unknown during the months of July and August 1973, Respondents, by David Frances, their plant superintendent and supervisor, by Thomas Monahan, their laborers' foreman and supervisor, and by other agents and supervisors presently unknown, at their place of business, interrogated their employees concerning the employees' membership in, activities on behalf of, and sympathy in and for the Union.

10. On or about July 23, 1973, and on various other dates presently unknown during the months of July and August 1973, Respondents, by David Frances, their plant superintendent and supervisor, and by other agents and supervisors presently unknown, at their place of business, warned and

directed their employees to refrain from becoming or remaining members of the Union and to refrain from giving any assistance or support to it.

11. On or About July 23, 1973, July 27, 1973, and on various other dates presently unknown during the months of July and August 1973, Respondents, by David Frances, their plant superintendent and supervisor, and by other agents and supervisors presently unknown, at their place of business, threatened their employees with discharge and other reprisals if they became or remained members of the Union, and if they gave any assistance and support to it.

12. (a) On or about the dates listed below, Respondent Clearview discharged the following named employees:

Name of Employee	Date of Discharge
John Winfield	July 26, 1973
Salvatore Di Somma	July 26, 1973
Peter Leonardi	August 2, 1973
George Bartoli	August 8, 1973
Earl Nare	August 8, 1973

(b) On or about August 2, 1973, Respondent Grand discharged its employee, Louis Leonardi.

13. Since the dates of the discharges of the employees as described above in paragraph 12, Respondents have failed and refused to reinstate, or offer to reinstate, said employees to their former or substantially equivalent positions of employment.

14. Respondents discharged, and thereafter failed and refused to reinstate their employees John Winfield, Salvatore Di Somma, Louis Leonardi, Peter Leonardi, Earl Nare and George Bartoli, as described above in para-

graphs 12 and 13, because said employees joined and assisted the Union and engaged in other concerted activity for the purpose of collective bargaining and mutual aid and protection.

15. By the acts described above in paragraphs 9 through 14, and by each of said acts, Respondents interfered with, restrained and coerced, and are interfering with, restraining and coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby engaged in, and are engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

16. By the acts described above in paragraphs 12, 13 and 14, and by each of said acts, Respondents discriminated, and are discriminating in regard to the hire and tenure and terms and conditions of employment of their employees, thereby discouraging membership in a labor organization, and thereby engaged in, and are engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and Section 2(6) and (7) of the Act.

17. The acts of Respondents described above in paragraphs 9 through 14, occurring in connection with the operations of Respondents, described above in paragraphs 2 through 6, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

PLEASE TAKE NOTICE that on the 16th day of January, 1974 at 11 a.m. at 16 Court Street, fourth floor, in the Borough of Brooklyn, City and State of New York, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set

forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Statement Of Standard Procedures In Formal Hearings Held Before The National Labor Relations Board In Unfair Labor Practice Cases, is attached.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondents shall each file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to the said Complaint within ten (10) days from the service thereof, and that unless they do so, all the allegations in the Complaint shall be deemed to be admitted by each to be true and may be so found by the Board. Immediately upon the filing of their answer, Respondents shall serve a copy thereof on each of the other parties.

Dated at Brooklyn, New York, this 30th day of November, 1973.

Samuel M. Kaynard

Samuel M. Kaynard
Regional Director, Region 29
National Labor Relations Board
16 Court Street
Brooklyn, New York 11241

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ANSWER

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

CLEARVIEW CONCRETE PIPE CORP., d/b/a CLEARVIEW CONCRETE PRODUCTS CORP. AND GRAND PRE-STRESSED CORP.	:	
AND	:	Case No.29-CA-3560
EARL NARE, An Individual	:	

ANSWER

Respondents, Clearview Concrete Products Corp., (formerly known as Clearview Concrete Pipe Corp.) and Grand Pre-Stressed Corp., as and for their answer to the complaint herein, allege as follows:

FIRST: Deny knowledge or information sufficient to form a belief as to that portion of paragraph 1(a) that alleges that the Charge was filed by Earl Nare on September 21, 1973 but admit that a copy of the Charge was served by registered mail upon the respondent Clearview on or about September 21, 1973.

SECOND: Deny knowledge or information sufficient to form a belief as to so much of paragraph 1(b) that alleges that The First Amended Charge was filed by Earl Nare on November 26, 1973 but admit that a copy of the Charge was

served by registered mail upon respondents on or about November 26, 1973.

THIRD: Respondents admit the allegations of paragraphs 2(a), 2(b), 3(a) and 3(b).

FOURTH: Deny the allegation of paragraph 4.

FIFTH: In answer to paragraph 5, respondents deny knowledge or information sufficient to form a belief as to the allegations that the goods and materials valued in excess of $50,000 were transported and delivered to their place of business in interstate commerce directly from states of the United States other than the State of New York.

SIXTH: Deny each and every allegation stated and contained in paragraph 6.

SEVENTH: Deny knowledge or information sufficient to form a belief as to each and every allegation stated and contained in paragraph 7.

EIGHTH: Admit the allegations of paragraph 8.

NINTH: Deny the allegations of paragraphs 9, 10 and 11.

TENTH: Admit the allegations of paragraphs 12(a), 12(b) and 13.

ELEVENTH: Deny each and every allegation stated and contained in paragraph 14, 15, 16 and 17.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE:

TWELFTH: John Winfield and Salvatore DiSomma were discharged by Respondent Clearview on or about July 26, 1973 because said Respondent did not, at that time, have sufficient work to keep said individuals employed and the said individuals were not discharged as a result of any membership in, or activities on behalf of any labor organization.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE:

THIRTEENTH: Peter Leonardi, George Bartoli and Earl Nare, were discharged by Respondent Clearview and Louis Leonardi was discharged by Respondent Grand under dates of August 2, 1973, August 8, 1973, August 8, 1973 and August 2, 1973, as a result of said individuals failing and refusing to perform work tasks assigned to them in a proper and efficient manner and in accordance with the custom established in the performance of work by said individuals, which failure and refusal, on information and belief, came about as a result of the discharge of John Winfield and Salvatore DiSomma on or about July 26, 1973 and as a result of a lack of work to keep said individuals employed and not because of any membership in, or activities on behalf of, any labor organization.

WHEREFORE, respondents respectfully request that the complaint herein be in all respects dismissed.

Dated: New York, N.Y.
December 15, 1973

HYNES & DIAMOND
ATTORNEYS FOR RESPONDENTS
Office & P. O. Address:
25 Broadway
New York, N.Y. 10004
(212) 422-9424

A 16

ORDER RESCHEDULING HEARING

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CLEARVIEW CONCRETE PIPE CORP., d/b/a
CLEARVIEW CONCRETE PRODUCTS CORP.,
AND GRAND PRE-STRESSED CORP.

and

EARL HARE, An Individual

Case No. 29-CA-3560

ORDER RESCHEDULING HEARING

IT IS HEREBY ORDERED that the hearing in the above-entitled matter be and the same hereby is rescheduled from January 16, 1974, to February 19, 1974, at 11:00 a.m., same place.

DATED at Brooklyn, New York, this 9th day of January, 1974.

Regional Director,
National Labor Relations Board

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NOTICE OF PRE-HEARING CONFERENCE DATED FEBRUARY 5, 1974

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

CLEARVIEW CONCRETE PIPE CORP., d/b/a
CLEARVIEW CONCRETE PRODUCTS CORP.,
AND GRAND PRE-STRESSED CORP.

and Case No. 29-CA-3560

EARL NARE, An Individual

NOTICE OF PRE-HEARING CONFERENCE

Pursuant to the newly instituted pre-hearing procedures of the National Labor Relations Board, the pre-hearing conference in this matter will be conducted on February 11, 1974, at 4:00 p.m., at 16 Court Street, Fourth Floor, Brooklyn, New York.

The trial of the case as set forth in the Complaint previously issued, will be held on February 19, 1974, at 11:00 a.m., at 16 Court Street, Fourth Floor, Brooklyn, New York.

DATED at Brooklyn, New York, this 5th day of February, 1974.

Samuel M. Kaynard

Samuel M. Kaynard
Regional Director
National Labor Relations Board, Region 29
16 Court Street
Brooklyn, New York 11241

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REQUEST FOR AN ADJOURNMENT OF HEARING

BY HAND

February 14, 1974

Hon. Samuel Kaynard
Regional Director
National Labor Relations Board
Region 29
16 Court Street
Brooklyn, N.Y.

Re: Clearview Concrete Pipe Corp. and Grand Pre-Stressed Corp. and Earl Nare, Case No. 29-CA-3560

Dear Sir:

The hearing in the above matter is scheduled to commence on Tuesday, February 19, 1974.

Request for adjournment is made on the grounds that the principal witness on behalf of Clearview Concrete Pipe Corp. and Grand Pre-Stressed Corp. will not be available to give testimony by reason of his presence in the State of California, and will not return to New York until February 27, 1974.

Accordingly, respondents in the above matter will be grossly prejudiced if compelled to proceed with the hearing in this matter without having their principal witness available to testify on behalf of the respondents.

In addition, the undersigned, in connection with a matter pending in the New York State Court of Claims against the State of New York, has been scheduled to appear on Tuesday, February 19, 1974 before the Hon. Joseph Modugno in connection with certain pre-trial discovery procedures in the State claim matter.

Accordingly, respondents respectfully request an adjournment of the hearing to Thursday, February 28, 1974.

FPD/er
cc: Earl Nare
Clearview Concrete Pipe
Grand Pre-Stressed Corp.
Ms. Martha Kave

Very truly yours,

HYNES & DIAMOND

S/ FRANCIS P. DONEGAN

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REGIONAL DIRECTOR'S ORDER DATED FEBRUARY 15, 1974

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

CLEARVIEW CONCRETE PIPE CORP., d/b/a
CLEARVIEW CONCRETE PRODUCTS CORP.,
AND GRAND PRE-STRESSED CORP.

and Case No. 29-CA-3560

EARL NARE, An Individual

ORDER

IT IS HEREBY ORDERED that Respondent's request for postponement of the hearing in the above-entitled matter is hereby denied. The hearing will go forward as scheduled on February 19, 1974, at 11:00 a.m., at 16 Court Street, Fourth Floor, Brooklyn, New York.

DATED at Brooklyn, New York, this 15th day of February, 1974.

Samuel M. Kaynard
Regional Director
National Labor Relations Board, Region 29
16 Court Street
Brooklyn, New York 11241

ADMINISTRATIVE LAW JUDGE BENJAMIN B. LIPTON'S DECISION
ISSUED JUNE 14, 1974

JD-388-74
Deer Park, N.Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D. C.

CLEARVIEW CONCRETE PIPE CORP.
d/b/a CLEARVIEW CONCRETE
PRODUCTS CORP., AND GRAND
PRE-STRESSED CORP.

and

Case No. 29-CA-3560

EARL NARE, an Individual

Martha R. Kave, Esq., for the
General Counsel.
Francis P. Donelan, Esq., of
New York, N. Y., for the
Respondents.

DECISION

Statement of the Case

BENJAMIN B. LIPTON, Administrative Law Judge: Upon a complaint by the General Counsel alleging that Respondents engaged in certain violations of Section 8(a)(1) and (3) of the Act, a trial was conducted in Brooklyn, New York, on February 19 and 20, and March 4, 1974. 1/ Briefs filed by General Counsel and Respondents have been duly considered.

On the entire record, and upon my observation of the demeanor of the witnesses, I make the following:

1/ All dates are in 1973, unless otherwise noted. The complaint issued on November 30, based upon a charge filed on September 21 and amended on November 26.

Administrative Law Judge Benjamin B. Lipton's Decision
Issued June 14, 1974

JD-388-74

Findings of Fact

I. Jurisdiction

Clearview Concrete Pipe Corp., herein called Clearview, is engaged in the manufacture, sale and distribution of concrete pipe and related products. Grand Pre-Stressed Corp., herein called Grand, is engaged in the manufacture, sale and distribution of pre-stressed concrete and related products. Respondents, having their principal offices and place of business in Deer Park, Suffolk County, New York, constitute a single integrated enterprise operating in general with common officers, ownership and direction, and a common labor policy affecting their employees. 2/ During the year preceding issuance of the complaint, Respondents had a direct inflow in interstate commerce of purchased goods and materials valued in excess of $50,000. Respondents admit, and I find, that they are engaged in commerce within the meaning of the Act.

II. Labor Organization

District 15, International Association of Machinists and Aerospace Workers, AFL-CIO, herein called the Union or the Machinists, is a labor organization within the meaning of the Act.

III. The Unfair Labor Practices

A. Essential Issues

1. Whether Respondents coercively interrogated each of six maintenance employees and made threats to discharge these employees for their activities in seeking representation by the Union, in violation of Section 8(a)(1).

2. Whether Respondents violated Section 8(a)(3) in terminating the six maintenance employees, successively, on July 26, August 2 and August 8.

2/ For the purposes of this case, at least, the distinction between the two companies is purely nominal so far as employees and employment conditions are concerned.

Respondents deny all the alleged violations, and assert as affirmative defenses that (a) the first two maintenance employees were laid off for lack of work, and (b) thereafter the remaining employees were discharged for failing and refusing to perform their assigned work "in a proper and efficient manner" and for lack of work.

B. Background and Organizational Activity

About 70 employees are employed by Respondents working within the same plant facilities. As generally appears, the bulk of these employees are represented in three contract bargaining units by the Teamsters, the Operating Engineers, and the Laborers. However, the maintenance employees here in question have been excluded from these units, were denied memberships in the recognized unions, 3/ and were unrepresented.

In late June, after earlier discussions among certain of the maintenance employees, Earl Nare approached the Machinists and a meeting between Union Agent Henry Rizzo and the employees was arranged. On July 6, at such a meeting held with four of the maintenance employees near Respondents' plant, Rizzo described organizing procedures and distributed blank authorization cards. Subsequently, these cards were signed by all six maintenance employees. 4/ About July 16, the cards were mailed as a group to the Union.

Dated July 20 (Friday), the Union sent Respondents a formal letter claiming, and offering tu furnish proof, that it represents a majority of the employees, and requesting recognition and negotiation of a contract for a unit of "all mechanics, helpers, welders, maintenance and all service employees." 5/

3/ Testimony of Louis Leonardi.

4/ Earl Nare, Louis and Peter Leonardi, George Bartoli, John Winfield and Salvatore DiSomma.

5/ General Counsel represented that a (refusal to bargain) charge filed by the Union was subsequently withdrawn apparently because of a jurisdictional conflict with one of the recognized unions at Respondents' plant. The Union did not enter an appearance in the present proceeding.

C. Interrogations and Threats of Discharge

Louis Leonardi testified that, about July 20, he and his brother Peter were in the office of Plant Superintendent David Frances reporting for night shift duty at 4 p.m. Frances asked him what kind of a union he was in at his previous job with a bus company and, when answered, further inquired if that had anything to do with the Machinists. Thereafter, at least once each day until he and his brother were terminated on August 2, Frances questioned him and remarked concerning the Union, e.g.; "I know you guys signed cards, who started it?" "The companies are not going to put up with it. You guys are all going to get laid off. You went about it the wrong way." On five or six occasions beginning about July 23, Foreman Thomas Monahan interrogated and threatened Louis Leonardi, as follows: "Who started the Union?" "You guys are crazy, you are not going to get away with it." Louis Leonardi refused to reveal the requested information. Peter Leonardi corroborated his brother Louis concerning the questions and remarks of Frances which commenced "around July 20" and were repeated daily until they were discharged.

Nare testified to interrogations and threats by Frances occurring almost each day from about July 20 until his termination on August 8, to wit:

> He asked me who was responsible for associating the union and if I belonged to this union before or how we found this union and the company wouldn't stand for the union. . . . We'll find ways to cut down on either--send the trucks out for repair or discharge men or something.

About July 23, Monahan asked Nare if he was responsible for the Union, and then remarked,--"now probably--everybody will get laid off because /Nare/ started waving the flag around."

Bartoli testified: Upon his return on August 2 from one week's vacation, Frances questioned him "practically daily" five or six times before his own discharge on August 8 --as to "who brought the Union in." At a later point,

Bartoli requested that he be not asked any more, and stated he did not know, and would not tell even if he did know. During this period, after August 2, Monahan passed the remark,--"I'm surprised at you, George, you know you are not going to get nowhere, you are going to get laid off, they are going to lay off two at a time until yourself all go, whoever signed up." 6/

Winfield testified that Frances questioned him each day from July 23 until his termination on July 26--as to who started the Union. 7/ One response was that it was a unanimous decision of these employees.

DiSomma testified that, on July 26, Frances asked him "who started this business?" He replied that he did not know, and would not tell if he did know. Later that day, after he was terminated by Frances, he heard Monahan say to a group of (unidentified) people at the cooler--"Well, there's two this week, there will be two next week." DiSomma then informed Louis Leonardi of Monahan's remark. 8/

The foregoing testimony of the six maintenance employees carries a conviction and plausibility which, in my opinion, clearly warrants full credibility. Superintendent Frances admitted that he separately interrogated Nare, Louis Leonardi, and Bartoli as to why they wanted the Union, 9/

6/ Shortly after DiSomma was laid off on July 26, he told Bartoli Monahan had made the same remark--that the maintenance men will be laid off two at a time each week. Bartoli then approached Frances concerning this "rumor," and Frances merely replied that he did not know.

7/ Winfield identified several laborers, as well as Monahan, who were present on one such occasion.

8/ Bartoli, Peter Leonardi and DiSomma were not cross-examined concerning the interrogations and threats.

9/ In the testimony of Frances, he also asked Nare what local they were trying to get in. Although he knew the answer, he "wanted to see if /Nare/ knew." He described Leonardi's response to the interrogations:--"he just said, well, you know, and he took off."

and initially denied that he discussed the Union with DiSomma, Winfield and Peter Leonardi. Concerning the Union, he indicated at a later point that he "asked everyone more than once."

It is well apparent, in my view, that Respondents' case is replete with machinations, anomalies, and dissimulations. Respondents' counsel eventually "stipulated" that Respondents did receive, on July 23 or 24, the Union's letter dated July 20 containing the bargaining request for the maintenance employees, supra. However, Vice President Vincent DeLillo testified he did not disclose or discuss the letter with Superintendent Frances until July 29 or 30. 10/ Admittedly, a copy of the letter was promptly sent to Attorney Donelan. Frances disclaimed knowledge of the Union prior to July 30 or 31, when DeLillo purportedly showed him the Union's letter, and he insisted that his interrogations did not commence before such time. It suffices generally to assign knowledge of the Union to Respondents that the Union's letter was in Respondents' hands, as I find, at least by Monday, July 23. From the testimony of of the six maintenance employees, it is evident that Frances and Monahan had an awareness of the union organizational effort on or before July 23, whether or not either of them were actually shown or apprised of the Union's bargaining request at such time. In substantial respects, I find and regard the testimony of Frances as self-contradictory, changing, contrived and unworthy of credit. The single sweeping denial by Monahan that he had ever discussed the Union with any of the six maintenance employees--is rejected. Accordingly, I conclude that, in the separate instances described above, Respondents engaged in coercive interrogations and threats of discharge, contituting serious violations of Section 8(a)(1) of the Act, as alleged.

D. The Terminations

1. Winfield and DiSomma--July 26

In the late afternoon on July 26, Winfield and DiSomma were "laid off" by Frances. The reason he gave each of them was--"things are getting slow." Preceding this

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10/ DeLillo was not directly asked when he received the Union's letter.

action, Frances told the Leonardi Brothers he wanted to show them something, and took them to the back of the shop where they witnessed the termination of Winfield. Then he called out to the personnel within earshot--"There, you all heard me tell him we are slowing down. We don't need him anymore." Shortly thereafter in the maintenance shop, Frances openly challenged Nare,--"Now see what your union can do for you. There's a telephone." Nare attempted to place a call but was unable to get an outside line. 11/ On occasion during the following days, Frances would ask Nare in a joking vein, --"Where are you going to work next week?"

The above testimony is not specifically refuted by Frances and stands in contrast with his broad denials, supra, that he was even aware of the Union on July 26. Two further sidelights are noted relating to Frances' knowledge of the Union on this date. When Winfield was preparing to leave the plant following his layoff, Frances remarked to him, "You are not going to take this lying down, I am sure." And, according to Frances, when he informed DiSomma of his layoff, DiSomma inquired whether it had anything to do with the Union; he merely replied, "What union?" and walked away. 12/

Added to the interrogations and threats already found, the telephone incident with Nare on July 26 further reveals a distinct antagonism of Frances toward union organization of the maintenance employees. And his manner of effecting the layoffs on July 26 strongly suggests a planned purpose of warning the remaining maintenance employees that further terminations would follow on the same grounds that "things were getting slow."

c. The Leonardis--August 2

Louis and Peter Leonardi regularly worked on the night shift, from 4 p.m. until midnight. They were scheduled to begin their vacation on Monday, August 6. On August 1,

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11/ The foregoing evidence was given by Nare, the Leonardis and Winfield. Monahan, who was present, was not questioned concerning these events.

12/ On cross-examination, Frances attempted to explain that DiSomma merely alerted him to something going on, but he had no knowledge of "which local or union" was involved.

Louis Leonardi asked Superintendent Frances,--"If you are not going to fire me this week . . . is it all right if I go on vacation next week? I would like to get my check tomorrow." Frances said he would let him know. A few minutes later, Frances came back and instructed both Leonardis to report for work the next morning, on the day shift. On August 2, about 2 p.m., Frances handed each of the Leonardis their final checks, which included vacation pay, signed by Vice President DeLillo. He indicated they were laid off, and gave no reason. Later, Frances and Monahan approached Peter Leonardi as he was packing his tools. Frances stated he was sorry, there was nothing he could do, it was out of his hands. He made the same remarks to Louis Leonardi.

3. Nare and Bartoli--August 8

When Frances notified these employees on August 8 that they were "laid off," he conveyed no reason for such action. He told Nare that his paycheck was sent over "from the office," that his "hands were tied, he had nothing to do with it, orders came from upstairs." And he asked, "You are not going to take this lying down, are you? What is this union going to do for you?" Similarly, Frances told Bartoli--"this is coming from the office, it is beyond my control," and he was "sorry it happened this way." This uncontradicted testimony, as with the Leonardis on August 2, plainly belies Respondents' contention that Frances acted entirely alone in the decisions to terminate each of the six men in the maintenance department.

E. Respondents' Defenses; Further Evidence; Conclusions

Respondents' reason for laying off the first two employees, on July 26, is grounded on "lack of work." The affirmative defense, which appears in counsel's answer to the complaint, asserts that, on August 2 and August 8, the remaining four maintenance employees were "discharged" as a result of "said individuals failing and refusing to perform work tasks assigned to them in a proper and efficient manner and in accordance with the custom established in the performance of work by said individuals, which failure and refusal, on information and belief,

came about as a result of the discharge of John Winfield and Salvatore DiSomma on or about July 26, 1973, and as a result of a lack of work to keep said individuals employed. . . ." There is no "information" and no indicated basis for "belief" of any individual or concerted decision or action by the Leonardis, Bartoli or Nare to engage in a slow down or reduction in their normal efficiency following the "discharge" of Winfield and DiSomma. The additional ground, that of lack of work, advanced for the later four discharges appears to claim there was suddenly no work to sustain the entire preexisting maintenance department as of August 8. Such a claim is unsupported and patently fallacious.

Respondents' general position of lack of work embraces a limited period of 3 or 4 months preceding the terminations during which the maintenance employees, and others, were assigned for a portion of their time to perform certain work on "bogies." A "bogie" consists of a large metal frame from 80 to 100 feet long, with eight wheels, which is used by Respondent as a trailer for hauling beams or other heavy pre-stressed concrete products. In April or May, Respondents purchased 12 "dollies" as army surplus which it undertook to convert to the bogies. The process required the welding, or "fabricating," of heavy metal plates and a variety of mechanical and electrical work. The main task of constructing the bogies was completed in the last week of July, when Respondents began to use them for deliveries. However, there was a continuing need of repair and maintenance of the bogies. Prior to such purchase of army surplus, Respondents employed in its operations other bogies on which various maintenance work was routinely performed. Frances gave as reason for the overtime work that there was a "deadline" for the completion of the bogies, originally set for July 15, but postponed. As purported justification for the termination based on "lack of work," this testimony does not reconcile with the overwhelming evidence. If such a deadline existed, it is exceedingly strange that the employees were given no advance notice of such deadline and the possibility of layoff due to a slackening of work. Indeed, the employees were consistently and substantially occupied in jobs, including overtime, unrelated to the bogies in the long period preceding as well as during the few months of the army surplus conversions.

Nare had been employed by Respondents 13/ for 6½ years as a trained mechanic, working on trucks, forklifts, payloaders (concrete mixers), pipe machines and general plant maintenance. He testified there were always projects and tasks to be performed; he was never lacking in work. Nare spent about 2 hours a day on the army surplus bogies --until his discharge on August 8.

Bartoli had been employed with Respondents for about 2 years and 8 months. As a mechanic, he performed the same work as Nare, as well as certain welding functions. Apparently for the major part of his employment until his discharge, on August 8, his regular workweek averaged 53 hours, or 13 hours at overtime pay. It appears that the competence of Bartoli, in particular, was highly regarded by Frances and Monahan. In June, and each year when the vacation list was prepared, the maintenance employees were invited by Respondent to work during all or part of their 2-week paid vacations and receive double pay for such work. Bartoli agreed to work for 1 week of his vacation, at the end of July. He testified that about 50 percent of his time was spent during a 2-month period working on the army surplus bogies. He was given charge of this project and distributed the work to the rest of the men.

Louis Leonardi had been employed, mainly on the night shift, for about 2½ years as a mechanic. He was responsible for repairing pipe machinery on which 20-30 laborers depended for their work the next morning, and had regular repairs on forklifts, cement mixers, trucks, and other equipment. On the army surplus bogies, he devoted about 1 or 2 hours a night--only when he had time left over from his other, priority, duties.

Winfield worked for about 2 years, performing general duties as a mechanic and also did some shop welding. In addition, for about 5 months until his termination, on July 26, he operated a "payloader" from 4 to 6 p.m. almost every day. 14/ He testified, as of July 26, there were

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13/ Nominally he was on the payroll of Respondent Grand. He worked and was supervised together with employees of Respondent Clearview.

14/ During the regular day shift ending at 4 p.m., an operating engineer ran the payloader.

several major repair jobs in process and other jobs waiting to be done. On one job (rebuilding the transmission of a payloader), the mechanics needed about 3 more weeks to complete the repair. He did "some work" on the army surplus bogies, but not every day.

DiSomma was employed for over 1 year doing mostly repair and heavy welding. Prior to his termination, he worked overtime 2 or 3 Saturdays each month and 1 or 2 hours during the week because "there was so much work to catch up on." At Respondents' request, he consented to forego 1 week of his vacation because he was told there "was plenty of work" for him. A "considerable amount" of his time was spent on the army surplus bogies. Actually, the work on these bogies was never finished; they would break down or crack, and there was always something to do on them. At the time of his termination, he was working on a job, which consumed most of his time, welding large pallets, unrelated to the bogies. Foreman Monahan then told him there were 3 or 4 months of full-time work to be done on these pallets. Only DiSomma was permitted to perform this type of work, which required "special welding."

Peter Leonardi was employed for about 13 months as a helper in maintenance and mechanical work. Inter alia, he was responsible for greasing and cleaning all the vehicles and machines. He testified he told Frances, who was aware, that it was impossible to keep up with the greasing and cleaning because he had to do so much other work on the night shift. On most, but not all, nights in the week he was able to work about 4 hours on the army surplus bogies since the project was begun about May 1.

Arty Carbone and Rodriguez Gomez were purportedly hired as "laborers" in about the spring of 1973 and directly assigned to perform welding work on the bogies in conjunction with the maintenance crew. 15/ Gomez, particularly, was not an experienced welder and had to be trained by DiSomma. Frances was never critical of Disomma's work, but did complain about Gomez. After the termination of the six regular maintenance employees, Carbone and Gomez were

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15/ Frances stated Gomez worked 4 to 5 months, until he quit in November.

were continued in their same employment. 16/ In Frances' testimony, he told all six maintenance employees in virtually identical language that--"things are getting slow, I have to let you go." He indicated that he made the decisions to terminate these employees on the successive dates in accordance with the Company's seniority policy. And he stated that, since the terminations, all maintenance welding has been performed by laborers.

During Nare's entire tenure of 6½ years, there were no prior layoffs of maintenance employees, as he credibly testified. 17/

Respondents' witnesses generally disclosed that new maintenance employees were hired beginning in "late August." After a turnover of four such employees, who could not handle that work, two mechanics were found suitable and have since been employed. 18/ These new maintenance employees have been working overtime, and the night shift has been eliminated.

It appears that Nare was the only maintenance mechanic during his first 3 years of employment, since early 1967. However, commencing about December 1970, additional maintenance employees were hired "when they were forming Grand Pre-Stressed across the street." The manifest evidence, sought to be ignored by Respondents, is that the maintenance department of six employees was formed and intact substantially before the short term bogie project was begun in the spring of 1973. Thus, preceding their terminations, four of the maintenance crew had been

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16/ Frances testified that Gomez received the same pay, $5.20 an hour, as did Nare, Bartoli, Louis Leonardi and Winfield. DiSomma's rate was $4.70.

17/ In testifying that there were instances of such layoffs, Frances specified the names of Carpenter and Salanie. On cross-examination, he admitted that these two individuals were in fact members of the Operating Engineers. His vague mention of an employee called "Ron" is unacceptable. Respondents had records which could readily have been produced.

18/ Monahan's testimony.

continuously employed for 2 or more years, and two had been so employed in excess of 1 year. Respondents' testimony and insistent arguments that, following the six terminations as of August 8, the "normal" complement of two maintenance employees in the department was resumed--is dismissed as sheer fabrication. And the broad contention that, suddenly, at the conclusion of the bogie conversions, there was no work to sustain the entire maintenance crew--is likewise wholly unsupportable. The specific and uncontradicted evidence of the employees amply establishes that there was full-time work for the regular six-man department after July 26 to the same extent as existed for the long term preceding the interval of the bogies. 19/ Moreover, there is scarce justification for the retention of Gomez and Carbone in maintenance work while laying off the regular maintenance employees, particularly DiSomma, Winfield and Bartoli who were doing skilled welding work.

There is likewise a complete lack of merit in the vague defense that, since the first termination on July 26, the four remaining maintenance employees did not perform their work "in a proper and efficient manner" in the period until their respective terminations on August 2 and 8. These four employees of substantial tenure were not warned or reproached for inefficient work, and were told only that they were laid off for lack of work. Their immediate supervisor, Monahan, testified he did not speak to any of these employees directly concerning alleged deficiencies, but merely informed Superintendent Frances that certain work had not been done, indicating a need rather than a criticism. Even as embellished by Frances, his alleged complaints against these employees consisted of no more than the usual requests to "hustle it up" or to get a needed repair job done. He admitted there are "always complaints with everyone." 20/ I find that, in this short period, the employees

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19/ Louis Leonardi testified that there was more work, and he worked even harder, after the first two men were laid off on July 26.

20/ I do not credit Frances' testimony, for example, that Nare was slowing up on all jobs, and that when he told Nare "you better shape up," Nare just smiled and "went along his merry way." I similarly view the apparently innocuous instances regarding the "400" machine, and Nare's sweeping the floors. The night (Continued)

were performing with their normal competence, and that there was no reasonable basis for terminating them on the alleged grounds of inefficiency.

Based on dubious testimony, without records, the point is stressed by Respondents that "normal" operations have continued since August 8 with only the two new maintenance employees. In all the circumstances, I do not consider the evidence shown as any proof refuting the alleged discriminations. It is recalled that Frances had threatened Nare that Respondents "wouldn't stand for the union" and "will find ways to cut down . . . send the trucks out for repairs or discharge men or something." Having the peculiar knowledge, Respondents have not probatively disclosed what was actually done after the terminations concerning performance of all the maintenance work which the record shows existed in full measure. Significantly, all maintenance welding is now being performed by laborers,--admittedly a shift to a different method of operation since the terminations. Since August 8, the extent to which newly hired laborers or others in the represented units have been utilized in the general maintenance functions, or whether trucks and other equipment previously serviced in the maintenance department were being sent out for such work, as threatened by Frances, are not elements within the General Counsel's burden to establish. The various defenses are manifestly pretextous; Respondents' animus is clear; and the timing of the terminations significantly follows closely upon the Union's request for recognition. Certainly, there was unlawful discrimination in terminating each of the six maintenance employees while continuing Gomez and Carbone in the maintenance shop and promptly thereafter undertaking to hire new maintenance employees.

In the entire record, the evidence is sufficient in support of the General Counsel's complaint that Respondents discharged the entire contingent of the existing maintenance department, fulfilling the express threats of Frances and Monahan, because of a compelling motivation

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20/ (Continued) shift assignments for the Leonardis were listed on a blackboard. It was a usual occurrence, preceding the bogie project, that some of these tasks could not be completed on the particular nights and that Frances mentioned the unfinished work to the Leonardis from time to time.

to bar their quest for representation by the Machinists and to prevent such attempts in the future. Accordingly, I conclude that Nare, Bartoli, Louis Leonardi, Peter Leonardi, Winfield and DiSomma were discharged in violation of Section 8(a)(3) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondents set forth in section III, above, occurring in connection with Respondents' operations described in section I, above, have a close, intimate, and substantial relation with trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondents have engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

In view of the discriminatory discharges and other serious violations, the cease and desist order in broad form is clearly warranted. 21/

It has been found that Respondents unlawfully discharged John Winfield and Salvatore DiSomma on July 26, Louis and Peter Leonardi on August 2, and George Bartoli and Earl Nare on August 8, 1973. It will therefore be recommended that Respondents offer these employees immediate and full reinstatement to their former positions, or if such positions no longer exist, to substantially equivalent positions, without prejudice to the seniority or other rights and privileges they previously enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination against them, by payment to them of a sum of money equal to that which they normally would have earned, absent the discrimination, with backpay and interest computed

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21/ N.L.R.B. v. Express Publishing Company, 312 U.S. 426; N.L.R.B. v. Entwistle Mfg. Co., 120 F.2d 532 (C.A. 4).

under the established criteria of the Board. 22/ It will be further recommended that Respondents preserve and make available to the Board, upon request, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary and useful to determine the amounts of backpay and the rights of reinstatement under the terms of these recommendations.

Upon the foregoing findings of fact, and upon the entire record, I make the following:

Conclusions of Law

1. Respondents are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Earl Nare, George Bartoli, Louis Leonardi, John Winfield, Salvatore DiSomma, and Peter Leonardi, thereby discouraging membership in the Union, Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. By the foregoing, and by other specific acts and conduct interfering with, restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the above findings of fact, conclusions of law, and the entire record in the case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: 23/

22/ F. W. Woolworth Company, 90 NLRB 298; Isis Plumbing & Heating Co., 138 NLRB 716.

23/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the (Continued)

Administrative Law Judge Benjamin B. Lipton's Decision
Issued June 14, 1974

JD-388-74

ORDER

Respondents, Clearview Concrete Pipe Corp., d/b/a Clearview Concrete Products Corp. and Grand Pre-Stressed Corp., Deer Park, Suffolk County, New York, their officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their union activities or those of their fellow employees.

(b) Threatening employees with discharge, or other reprisals, for seeking union representation or otherwise engaging in union or concerted activities.

(c) Discouraging membership in District 15, International Association of Machinists and Aerospace Workers, AFL-CIO, by discharging employees, or in any other manner discriminating in regard to hire or tenure of employment or any term or condition of employment.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmativa action designed to effectuate the policies of the Act.

(a) Offer Earl Nare, George Bartoli, Louis Leonardi, John Winfield, Salvatore DiSomma, and Peter Leonardi immediate and full reinstatement to their former positions, or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges, and make them

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23/ (Continued) findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

whole for any loss of earnings, in the manner set forth in "The Remedy" section of the Decision of the Administrative Law Judge.

(b) Preserve and make available to the Board or its agents all payroll or other records, as set forthin in "The Remedy" section of the Decision of the Administrative Law Judge.

(c) Post at their Deer Park, New York, plant and facilities, copies of the notice attached hereto as "Appendix." 24/ Copies of said notice, on forms provided by the Regional Director for Region 29, shall, after being duly signed by Respondent, be posted immediately upon receipt thereof in conspicuous places, and be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

Dated at Washington, D. C. JUN 14 1974

Benjamin B. Lipton
Administrative Law Judge

24/ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

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Administrative Law Judge Benjamin B. Lipton's Decision
Issued June 14, 1974

FORM NLRB-4727
(9-69)

JD-388-74

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A TRIAL IN WHICH BOTH SIDES HAD THE OPPORTUNITY TO PRESENT THEIR EVIDENCE, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE LAW AND HAS ORDERED US TO POST THIS NOTICE; AND WE INTEND TO CARRY OUT THE ORDER OF THE BOARD, AND ABIDE BY THE FOLLOWING:

WE WILL NOT question you regarding your union activities, or the union activities of your fellow employees, in a manner which would coerce you regarding your rights under the Act.

WE WILL NOT threaten you with discharge, or punishment of any kind, because you seek union representation or engage in any manner in union or concerted activities for your mutual aid and protection.

WE WILL NOT discharge or layoff employees, or otherwise discriminate them, in order to discourage membership or support for DISTRICT 15, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed employees in the National Labor Relations Act, which are as follows:

To organize themselves.
To form, join, or help unions.
To bargain as a group through a representative they choose.
To act together for collective bargaining or other mutual aid or protection.
To refuse to do any or all of these things.

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Administrative Law Judge Benjamin B. Lipton's Decision
Issued June 14, 1974

JD-388-74

Since it has been found that we unlawfully terminated the employees named below, WE WILL offer to give them back their regular jobs, or if those jobs no longer exist, we will give them substantially equivalent jobs; and WE WILL pay them for the earnings they lost because of the discrimination against them, with 6 percent interest.

EARL NARE	JOHN WINFIELD
GEORGE BARTOLI	SALVATORE DiSOMMA
LOUIS LEONARDI	PETER LEONARDI

All our employees are free to become or remain, or refrain from becoming or remaining, members of any labor organization of their choice, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act, as amended.

CLEARVIEW CONCRETE PIPE CORP., d/b/a
CLEARVIEW CONCRETE PRODUCTS CORP.
and GRAND PRE-STRESSED CORP.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street - 4th Floor, Brooklyn, N.Y. 11241 Telephone (212) 596-3535.

PETITIONER'S EXCEPTIONS IN OPPOSITION TO DECISION AND ORDER OF ADMINISTRATIVE LAW JUDGE DATED JULY 26, 1974

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 29

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CLEARVIEW CONCRETE PIPE CORP.
d/b/a CLEARVIEW CONCRETE PRODUCTS CORP.,
and GRAND PRE-STRESSED CORP.,

Case No.
29-CA-3560

and

EARL NARE, an individual

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EXCEPTIONS OF CLEARVIEW CONCRETE PIPE CORP. and GRAND PRE-STRESSED CORP. and ARGUMENT THEREOF IN OPPOSITION TO DECISION AND ORDER OF ADMINISTRATIVE LAW JUDGE

HYNES & DIAMOND
Attorneys for
Clearview Concrete Pipe
Corp. and Grand Pre-
Stressed Corp.
25 Broadway
New York, N. Y. 10004

Petitioner's Exceptions in Opposition to Decision and Order of Administrative Law Judge Dated July 26, 1974

STATEMENT OF THE CASE *1

The general counsel issued a complaint alleging that respondents herein engaged in certain violations of Section 8(a)(1) and (3) of the Act. Hearings were conducted in Brooklyn, New York on February 19th and 20th and March 4th, 1974 before Administrative Law Judge Benjamin B. Lipton who, on June 14, 1974, issued his decision in which he found respondents in violation of Sections 8(a)(1) and (3) of the Act.

It is respectfully submitted that the Board should reject and set aside the findings of fact, recommendations and conclusions of law of the Administrative Law Judge hereinafter specifically referred to, inasmuch as said findings of fact are manifestly against the weight of the evidence adduced at the hearing, and that said conclusions of law are legally insufficient and without requisite factual basis in connection with the evidence adduced at the hearings. Moreover, testimony which respondent's witnesses were prepared to give bearing upon the facts in issue in this matter was improperly excluded by certain rulings of the Administrative Law Judge, as will hereinafter be shown.

Strong exceptions is taken to the following findings and conclusions of the Administrative Law Judge and it is respectfully submitted and urged that the Board sustain the said exceptions and set aside the Administrative Law

*1 - References herein are designated as follows: The Judge's decision is designated as JD; the number following JD refers to the page, and L refers to the lines to which reference is made. Transcript references are designated as TR with the number following referring to the page and L. to the lines to which reference is made.

Judge's order as outlined below.

1. The Administrative Law Judge's findings (JD, 6, LL. 26 to 30) that the "testimony of Frances (was) self-contradictory, changing, contrived and unworthy of credit", and that the "single sweeping denial by Monahan that he had ever discussed the union with any of the six maintenance employees -- is rejected" is not only inappropriate but wholly unwarranted upon a fair reading of the entire record of testimony in this matter. Monahan's clear testimony is that he was not present the day that DiSomma and Winfield were laid off by Frances, nor was he present the day that Nare and Bartoli were laid off by Frances. He was present, however, the day that the Leonardis were laid off by Frances and that it was Frances who did the talking, rather than himself, except to shake hands and say good-bye to the Leonardis.

Monahan's testimony is entirely consistent throughout, that the maintenance personnel involved herein did not consider him to be their boss and that any work which he assigned to them was more in the nature of a request, and which requests were frequently ignored, in the absence of Frances, whom they did consider to be their boss. Moreover, Monahan's testimony was consistent that in such cases of his "requests" or "orders" being ignored, his recourse was to advise Frances, his own boss, rather than to take issue with the particular men involved. Monahan testified clearly that it was Frances' job to tell the

men anything about the quality of their work (TR. P. 210, LL. 14-16).

Similarly, the testimony of Frances is entirely credible and consistent throughout when fairly read in its entirety, namely, that whereas originally there had only been two maintenance mechanics employed by the respondents, this number was increased beginning with the getting under way of production by Grand Pre-Stressed Corporation and some time thereafter with the advent, some time in April or May of 1973, of the fabrication of the boggies, which boggies were required for a contract which called originally for a completion date of July 15th for the boggies, which date was thereafter extended for a short time. The testimony of all witnesses is consistent and the Administrative Law Judge appears to have recognized, that fabricating work is something quite different from normal maintenance work. Fabrication is the making of a completely new steel member or object out of other pieces of steel or steel members which were formerly something else or in another member. This process is quite different from "maintenance" or repairing or maintaining a piece of equipment or member in its original condition. The testimony is consistent that most, if not all, of the maintenance workers spent the largest portion of their time in the spring, early summer and summer of 1973 working on the boggies.

There can be no contradicting the fact that upon completion of the fabrication of the boggies near the end of July, 1973, a major portion of the work being performed by all of the maintenance employees would and/or did come

to an end, except for the normal and expected maintenance work required to keep the boggies operating, "like the maintenance on a car."

If there is one thing that is patently clear, it is that the Administrative Law Judge viewed all of the testimony with something less than an impartial eye in order to arrive at the aforementioned findings, inasmuch as one must necessarily ask why the maintenace employees waited until the very last moment, that is to say, until the precise time at which the fabrication of the boggies was being completed, to look around for a bargaining agent to represent them in their employment relationships with the respondent. Indeed, one cannot escape wondering why Mr. Nare, an employee of some six and one-half years, was content to be employed without any bargaining representation up until the very time that he was laid off.

The obvious answer is that the maintenance employees knew very well that they would be faced with the possibility of lay-off upon completion of the fabrication of the boggies in July of 1973. This fact becomes clear from the testimony of Mr. DiSomma when he testified as follows (TR. P. 145, LL. 17-24):

> "Q. When was the first time that the subject of unions came up?
>
> A. Around July 6th, Mr. Leonardi, that is Louis, came to George and I and he handed us a couple of cards saying, would we fill these cards out for Local 447 and we would be protected and nobody would be laid off, plus we would be covered by a union. That is what Mr. Leonardi said to me."

Indeed, the knowledge that the maintenance department would be faced with lay-offs upon completion of the fabrication of the boggies is, it is submitted, understandable inspiration for a concerted action to keep the blackboard or bulletin board filled with as many unfinished maintenance projects as possible. Viewed in its entirety, the testimony of the maintenance employees is that there was as much, if not more work to be done after the fabrication of the boggies was completed than there was during said fabrication, and that in this situation there were no more than the usual complaints from Frances and Monahan concerning the quality of the work. On the other side of the coin is the testimony of Frances and Monahan that there was a noticeable slowdown in the work of the maintenance department in the latter part of July, 1973, and particularly after the lay-off of the first two men on July 26, 1973. On this stage of the transcript, it is submitted that there is absolutely no basis or foundation for the Administrative Law Judge to "reject" the testimony of Monahan or to find the testimony of Frances "contrived". The fact of the matter is that the general counsel did not sustain his burden of proof on these issues and a complete and fair reading of all of the testimony mandates that the aforementioned findings of the Administrative Law Judge are erroneous and should be set aside.

2. The finding of the Administrative Law Judge (JD, P. 8, LL 20-30) that there was uncontradicted testimony that Frances did not act alone in the decisions to

terminate each of the six maintenance employees is simply not true. Frances, indeed, testified that it was his decision and his decision alone. And this testimony is confirmed in full by the testimony of DeLillo, who indicated very plainly that such decisions are what Frances gets paid for.

In light of this testimony by both Frances and DeLillo, it is inconceivable how the Administrative Law Judge can say that the testimony on this subject is "un contradicted".

3. The finding of the Administrative Law Judge (J.D. P. 13, L. 35 to P. 14 L. 4) that "I find that, in this short period (after July 26, 1973), the employees were performing with their normal competence, and that there was no reasonable basis for terminating them on the alleged grounds of inefficiency", blindly and arbitrarily overlooks the specific testimony of both Frances and Monahan to the contrary. Indeed, the testimony of many of the employees in the maintenance department confirms that both Frances and Monahan did make complaints of their work but, understandably, mitigated such admissions by adding that such complaints were "no more than usual". Monahan's testimony is clear, when fairly read, that neither he nor the employees considered it to be within Monahan's province either to order them directly to do work or to criticize them directly for not carrying out work which he had "requested". Instead he made his complaints to his superior, Frances, and such recognized and established

procedure in the plant, which a fair reading of all the testimony clearly supports, hardly calls for the vituperative conclusion of the Administrative Law Judge that such a course of action on the part of Monahan "indicat(ed) a need, rather than a criticism." (JD, P. 13, LL. 26 through 31).

The Administrative Law Judge stated, JD P. 14 LL 13-17 as follows:

> "Having the peculiar knowledge, respondents have not probitively disclosed what was actually done after the terminations concerning performance of all maintenance work which the record shows existed in full measure."

It is submitted that general counsel has failed in its burden of proof to show what actually was done concerning such performance since it was general counsel's burden to do so. What is clear is that respondents have shown, and the testimony of Frances and Monahan confirms, that the only reason that such work existed in such purported "full measure" after the terminations is because it was work which normally in the past was performed but for some unknown reason was now not being performed by the maintenance department. The evidence and testimony of both Frances and Monahan on this subject can only lead to the proper inference that the work accumulated "in full measure" because of the general and purposeful slowdown by the remaining members of the maintenance department.

Moreover, the Administrative Law Judge further states (JD P. 14 LL 26-29):

> "The various defenses are manifestly pretextous; respondents animus is clear; and the timing of the terminations significantly follows closely upon the union's request for recognition. Certainly, there was unlawful discrimination in terminating each of the six

> maintenace employees while continuing Gomez and Carbone in the maintenance shop and promptly thereafter undertaking to hire new maintenance employees."

The foregoing findings and conclusions of the Administrative Law Judge are manifestly arbitrary and improper. Upon a fair reading of the entire transcript of the testimony in this matter, it becomes clear that the charges of all six maintenance employees are, indeed, pretextuous; that all of them well knew that upon completion of the boggie fabrication project they would be faced with possible lay-off; and that accordingly, at the very last moment before such lay-offs were to commence, they "hustled up a union" to write a bargaining representation proposal letter to the respondents for the express purposes of being able to claim, when those lay-offs later occurred, that the lay-offs were a direct result of their organization rights under Section 8(a)(1) of the Act. This contention is confirmed by the fact that, as noted by the Administrative Law Judge's footnote 5 on page 3 of the Decision, a refusal to bargain charge filed by Local 447 was subsequently withdrawn because of a jurisdictional conflict with one of the recognized unions at respondent's plant.

It is submitted that there is no clear animus on the part of the respondents any more than there is clear animus on the part of the six maintenance employees involved herein. The timing of the union's request for recognition as the bargaining agent for the maintenance employees as significantly precedes the termination of the boggie fabrication work as the timing of the terminations

significantly follows upon the union's request for recognition.

And certainly, there is no unlawful discrimination in terminating each of the six maintenance employees where four of the six employees were terminated for slowing down on the job and unsatisfactory work product. This is buttressed by the fact that after the lay-off of the individuals involved in this proceeding, respondents operated and continue to operate with a maintenance staff of two men and did not increase that staff to the pre-lay-off level of eight to ten men, which would have been required if the lay-off of the six individuals was based on a discrimination, which obviously it was not. The fact of operating with a maintenance staff of two men clearly indicates that upon completion of the fabrication of the boggies, there was no work available.

Respondents specifically except to the Conclusions of Law of the Administrative Law Judge numbered 3, 4 and 5 for the reasons hereinbefore set forth.

Respondents specifically except to the Order 1(a), 1(b), 1(c), 1(d), 2(a), 2(b), 2(c) and 2(d) for the reasons that: (a) The lay-offs of Messrs. Winfield and DiSomma were predicated solely on the fact that respondents after completion of the fabrication of the boggies did not have sufficient work to keep said individuals employed; (b) The discharges of the Leonardi Brothers and Messrs. Nare and Bartoli were predicated on the dual basis of there being a lack of sufficient

to provide employment for said individuals and the fact that said individuals failed and refused to perform work tasks assigned to them in a proper and efficient manner and in accordance with the customs established in the performance of work by said individuals which failure and refusal came about as a result of the lay-offs of Messrs. Winfield and DiSomma.

Ample evidence was presented on the hearing to establish the foregoing and it is respectfully submitted that the General Counsel has failed to sustain the burden of proof required. General Counsel is required to prove that an employer committed unfair labor practices and the mere fact of a discharge creates no presumption of violation and an unlawful purpose is not lightly to be inferred. In this case the substantial weight of the evidence shows that the employee discharges were unrelated to union activities and accordingly proper. It is quite evident that the employees saw that the project on which they were all devoting all or a substantial portion of their time (fabrication of the boggies) was fast coming to a conclusion and undoubtedly foresaw that they would be laid off upon its conclusion. In an attempt to prevent the employer from a proper lay-off they sought to organize themselves as a collective unit apparently realizing that they could then attempt to blame their lay-off on alleged union activities and cover up the true reason for their lay-off, which was the lack of sufficient work to require their employment. This fact is wholly substantiated by

the fact that after the six individuals were laid off the respondents' maintenance department functioned and continues to function with only two maintenance men without the necessity of having additional maintenance personnel.

CONCLUSION

Accordingly, it is urged that the decision, findings and conclusions and order of the Administrative Law Judge should be set aside and reversed by the Board, and an appropriate Board order be issued consistent with said exceptions contained herein.

Respectfully submitted,

Dated: New York, N. Y.
July 25, 1974

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DECISION AND ORDER ISSUED BY THE NATIONAL LABOR RELATIONS BOARD DATED NOVEMBER 7, 1974

MJK

214 NLRB No. 98

D--9199
Deer Park, N.Y.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CLEARVIEW CONCRETE PIPE CORP., d/b/a CLEARVIEW CONCRETE PRODUCTS CORP., AND GRAND PRE-STRESSED CORP.

and

Case 29--CA--3560

EARL NARE, an Individual

DECISION AND ORDER

On June 14, 1974, Administrative Law Judge Benjamin B. Lipton issued the attached Decision in this proceeding. Thereafter, Respondents filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondents Clearview Concrete

A 53

Decision and Order Issued by the National Labor Relations Board Dated November 7, 1974

D--9199

Pipe Corp., d/b/a Clearview Concrete Products Corp., and Grand Pre-Stressed Corp., Deer Park, Suffolk County, New York, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C.

NOV 7 1974

Edward B. Miller, Chairman

Howard Jenkins, Jr., Member

Ralph E. Kennedy, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD